No. 86-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK R. SILVESTRI, SR.,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF AMICUS CURIAE FOR MICHAEL F. MURRAY

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Petitioner and the United States have consented to the filing of this *amicus* brief, which has been filed before December 20, 1986, the time allowed for the government's brief in opposition.

INTEREST OF THE AMICUS CURIAE

Michael F. Murray is filing, simultaneously with this *amicus* brief, a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit (*Murray v. United States,* No.86-_____) presenting the following question:

> When officers discover evidence during an illegal search, later obtain a valid warrant, "search" the premises again and remove what they previously found, must such evidence be suppressed, as seven other Circuits and the highest courts of at least nine states have decided, or does the inevitable discovery doctrine create an exception to the exclu-

sionary rule in such circumstances, as the First Circuit held in this case?

Murray was a co-defendant in *United States v. Moscatiello*, 771 F.2d 589 (1st Cir. 1985), and had filed a certiorari petition in the October 1985 Term raising this Fourth Amendment issue. See Petition for a Writ of Certiorari in *Murray v. United States*, No.85-1118. His petition also presented a question under the Speedy Trial Act. On May 27, 1986, this Court granted the petition, vacated the judgment and remanded the case "for further consideration in light of *Henderson v. United States*, 476 U.S. ___(1986)." On remand, the court of appeals adhered to its original decision that the Speedy Trial Act had not been violated (*United States v. Carter & Murray*, Nos.84-1262, 84-1263, decided October 7, 1986) and on October 31, 1986, denied a timely petition for rehearing. Justice Brennan, on December 9, 1986, ordered that the mandate be stayed pending the timely filing of a petition for a writ of certiorari.

The decision of the court of appeals in *United States v. Moscatiello, supra*, preceded and controlled the decision in this case (*United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986)). Therefore, the Court's disposition of Silvestri's certiorari petition may affect Murray's pending petition and his rights under the Fourth Amendment.

DISCUSSION

As the petition for a writ of certiorari filed by Michael F. Murray discusses in some detail, there is a conflict among the courts of appeals with respect to the important and recurring Fourth Amendment question presented in Murray's and Silvestri's

certiorari petitions. For the reasons that follow, the Court may wish to defer acting on Silvestri's petition so that it may be considered in conjunction with Murray's petition and the government's response thereto.

1. Silvestri's petition is out of time under Rules 20.1 and 29.1 of the Rules of this Court, as the government notes in its opposition.[1] Murray's pending petition does not present a timeliness problem.

2. The petition filed by Murray with this *amicus* brief is comprehensive and therefore may assist the Court in determining whether to grant review of the Fourth Amendment question presented in both cases.[2] For example, Murray's petition cites and discusses decisions from the highest courts of nine states that conflict with the First Circuit's judgment in *Silvestri* and in Murray's case. Murray's petition also explains why the "search-unlawfully-first-obtain-the-warrant-later" procedure endorsed by the First Circuit and supported by the government poses such a severe threat to Fourth Amendment values and why so many other courts of appeals have rejected it.

3. The government in *Silvestri* claims that the decisions in *United States v. Segura*, 663 F.2d 411, 417 (2d Cir. 1981), opinion on remand, 697 F.2d 300 (1982), *aff'd on other grounds*, 468 U.S. 796 (1984),

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[1] Silvestri first sought to file his petition on June 2, 1986, which was more than 60 days after entry of the judgment in his case. His petition was apparently returned because of a technical defect and was filed in its present form on October 30, 1986.

[2] Silvestri is appearing *pro se* and portions of his petition appear to have been copied from Murray's original petition and reply brief in No. 85-1118.

and *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974), may not be in conflict with the First Circuit's decision. Brief in Opp., at pp. 6-7 & n.5. The government is mistaken. As Murray's pending petition explains, the First Circuit itself acknowledged in his case that *Segura* is "on all fours" and that *Griffin* decided the issue the other way. *United States v. Moscatiello*, 771 F.2d at 603-04. To suppose, as the government does, that *Segura* and *Griffin* might today be decided differently in light of *Nix v. Williams*, 467 U.S. 431 (1984), is to beg the question presented. The Second Circuit had already recognized the inevitable discovery doctrine by the time it decided *Segura*. See *United States v. Falley*, 489 F.2d 33, 40 (2d Cir. 1973). Moreover, *Griffin's* refusal to emasculate the warrant requirement because the government "inevitably" would have complied with the Fourth Amendment, is scarcely surprising. Other courts of appeals, even after *Nix*, have reached the same result.

With respect to two of these other Circuits (see *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985)), the government asserts there is no conflict because, unlike *Silvestri*, there is no indication in *Satterfield* or *Cherry* that the police had decided to seek a warrant before they searched without one. Brief in Opp., at pp. 7-9. We have several responses.

First, the government's factual distinction in *Silvestri*—that the police "had already decided to obtain a warrant when the illegal entry occurred, and that the evidence in this case was not seized until after the warrant was obtained" (Brief in Opp., at p. 8)—

does not apply to Murray's case. There the court of appeals applied the inevitable discovery doctrine despite the facts that the officers had not decided to seek a warrant before they broke into the warehouse without one, that they had not taken any steps to procure a warrant before their illegal search, and that they had seized the evidence from the moment of their illegal discovery of it.[3]

Next, the First Circuit in *Silvestri* expressly considered and rejected *Satterfield* and *Cherry*, recognizing that if it followed those decisions the illegally discovered evidence in *Silvestri* would be suppressed. *United States v. Silvestri*, 787 F.2d at 743-46. *Sat-*

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[3] In asserting that the evidence in *Silvestri* "was not seized until after the warrant was obtained," the government contradicts the First Circuit's holding that the evidence was "illegally seized and the warrant did not effectuate a legal seizure." 787 F.2d at 741. Perhaps the government uses the term "seized" to mean that the evidence was not "taken away" until after the warrant issued. If so, the distinction is meaningless under the Fourth Amendment.

The government also thinks it important that the hiatus between the illegal search in *Silvestri* and issuance of the warrant may be explained on the basis that there were only a few police officers involved, that the events took place in the early morning hours, and that the policemen who were planning to get a warrant were busy following a truck to Massachusetts and driving back. Brief in Opp., at pp. 3-4 & n.1, 5; see also *United States v. Silvestri*, 787 F.2d at 745. No such explanation is possible in Murray's case. There the illegal search took place on a Wednesday afternoon; fifteen agents of the DEA and FBI were involved; and an Assistant United States Attorney was on the scene. That a warrant was not obtained until seven hours later cannot be attributed to driving distance. After the illegal search, agents proceeded directly to the United States Attorney's Office in Boston.

terfield and *Cherry* require that the police pursue the lawful means of discovery—a search warrant—before their illegality; yet the *Silvestri* court found "that the warrant process had not been initiated at the time of the discovery of the evidence." 787 F.2d at 742.

Furthermore, *Satterfield, Cherry, Silvestri* and Murray's case, as well as other cases involving this issue, have one critical fact in common—that the officers have determined not to obtain a warrant before conducting a search.[4] To hold, as the government urges, that the exclusionary rule does not apply whenever the officers later procure a search warrant for the same premises and take away what they have illegally discovered is to render the warrant process an empty formality and to contravene the Fourth Amendment's requirement that a warrant must be obtained *before* the search. The magistrate's role in such cases would be perverted. His warrant would function, not as a prior authorization to conduct a search, but as evidence that the police could have searched legally, as an exhibit to be held up as proof of inevitability. In the end, the government's message is that the police, in order to ensure the admissibility of illegally discovered evidence, should first announce among themselves or formulate in their minds a decision to seek a warrant and only then break down the door and conduct their illegal search. If they find anything worth removing, they can then seek a war-

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[4] The fact—or more accurately, the assumption (787 F.2d at 745)—that the police in *Silvestri* "decided to obtain a warrant" before they searched without one makes the case for suppression all the more compelling. It shows the police knew they needed a search warrant in order to enter the premises, yet entered anyway.

rant, being careful to conceal from the magistrate information about what they illegally found in order to ensure the warrant is untainted. See *Segura v. United States*, 468 U.S. 796, 814 (1984).

4. The government also claims there is no conflict between *United States v. Owens*, 782 F.2d 146 (10th Cir. 1986), and the decision in *Silvestri* because the "government's assertion in *Owens* was not that a lawful warrant would have been obtained, but that a motel maid would have found the evidence and reported it to the police," a proposition rejected as a factual matter. Brief in Opp., at p. 9. That is only part of the story. The court's holding in *Owens*, not the "government's assertion," is what matters. On that score, the court of appeals in *Owens* held that at the time of the illegal search there must be an independent police investigation underway, one that was being separately pursued, in order for the inevitable discovery doctrine to apply. 782 F.2d at 152. After recognizing that *Owens* so held, the court in *Silvestri* refused to follow that decision. 787 F.2d at 743, 745-46. The ruling in *Owens* is directly contrary to the First Circuit's decision in *Silvestri* and its decision in Murray's case, which involved "one continuous series of events," not "two separate searches for evidence . . .." Brief for the United States in Opp., Nos. 85-1105, 85-1118 and 85-1120, Oct. Term 1985.

5. The government believes that the First Circuit does not stand alone on this question, that the Ninth Circuit also applies the inevitable discovery doctrine in this Fourth Amendment context. See Brief in Opp., at p. 8 n.6, citing *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1497 (1986). However, as Murray's certiorari petition dis-

cusses, the Ninth Circuit's position is far from certain. In a case decided after *Merriweather*, Judge Reinhardt lamented "the passing of still another important part of the protection that the Fourth Amendment was intended to afford." *United States v. Andrade*, 784 F.2d 1431, 1434 (9th Cir. 1986) ("specially concurring"). Recently, however, another panel of the Ninth Circuit, without citing *Merriweather*, rejected the government's inevitable discovery argument, stating that "to excuse the failure to obtain a warrant merely because the officer had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the Fourth Amendment." *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) (dictum).

CONCLUSION

For the foregoing reasons, the Court may wish to defer action on the petition in this case so that it may be considered in conjunction with the certiorari petition of Michael F. Murray and the government's response thereto.

Respectfully submitted,

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